

**A New Castle City Board of Adjustment Hearing took place on
December 22, 2009 at 7:00 p.m. in the City of New Castle's Town Hall.**

Present: Mayor John F. Klingmeyer
Roger A. Akin, City Solicitor
David Athey, City Engineer

Mayor Klingmeyer called the meeting to order at 7 p.m. City Solicitor Roger Akin and City Engineer David Athey were introduced.

The Mayor read the Notice of Public Hearing that states, "An application has been filed by South River Plaza LLC, 730 Ferry Cut Off, New Castle, Delaware, from a decision to prohibit construction expanding a shopping center pursuant to Section 130-6 of the New Castle Municipal Code (the freeboard requirement of the flood plane regulations). Applicant seeks variances to certain Code requirements for required parking and finished floor elevation (to permit a total of 163 parking spaces and an elevation of 9.13 feet NAVD 1988) for a proposed expansion of the building located at 718 Ferry Cut Off, New Castle, Delaware, parcel number 21-015.00-200.

For the purpose of considering this application, the Board of Adjustment will hold a Public Hearing on Tuesday, 12/22/09 at 7 p.m. in Old Town Hall, 2nd Floor, located at 2nd and Delaware Street, New Castle, Delaware.+

An affidavit of publication was published in the News Journal on 12/7/09 and the New Castle Weekly on 12/9/09. Application payment was confirmed by Mr. Shawn Tucker, Esq. Mr. Bergstrom confirmed that the property has been properly posted. He then provided a brief background of the application. This application revisits a similar application from 1996 when the applicant made another small addition to the shopping center. This application proposes to put an addition on the northerly end of the plaza and enlarge one of the spaces at the end of the unit. The applicant is requesting a variance for both the elevation of the proposed addition to match the existing elevation of the part of building to be expanded and also requests a variance from a portion of the footer freeboard that the City demands for all new construction in the City. They also requested a similar parking variance. In 1996 the applicant indicated there were 150 spaces required for the existing parking lot and the current plan shows a total of 163 parking spaces. The incremental difference of 13 spaces should comply with existing parking requirements. *(The incremental addition of 1,480 square feet has 13 additional parking spaces above what the BOA previously demanded for the rest of the shopping center which is substantial.)*

Mr. Athey stated the plan before us this evening is different from the plan that was previously submitted. He questioned if a parking variance is necessary considering the building being proposed is smaller.

(Parties providing testimony were sworn in by the Mayor.)

Mr. Shawn Tucker is representing the applicant, South River Plaza LLC. He confirmed Mr. Bergstrom's background description.

Mr. Tucker said that in the 1996 decision it appears the Board of Adjustment gave both an interpretation of the Code and a variance as well. In reading the Code literally the parking standard is excessive. This Board must determine if the interpretation in 1996 is sufficient to not require a variance this evening or will this Board be cautious and follow the interpretation and also grant a variance in addition. He deferred to Mr. Akin on this point.

Mr. Akin said the Board may have viewed City requirements in 1996 concerning parking spaces for uses such as this one as overly severe. As an alternative calculus, the Board applied the New Castle County parking requirements for uses such as this shopping center and found sufficient spaces offered. The total square footage of the proposed addition is no longer 2,800 square feet.

Mr. Tucker confirmed Mr. Akin's comment. Revised plans were submitted to Mr. Bergstrom's office reducing square footage to 1,408 square feet, approximately 50% of the originally proposed size. These revised plans were needed based on the future tenant's needs. This was based on the 5.5 parking spaces per 1,000 square foot requirement which the applicant believes was the standard used in 1996. They feel the addition of 7 spaces would satisfy that standard.

Mr. Akin noted that the proposed number of spaces still does not meet the strict requirements of the New Castle City Code today and advised that a variance would be proper.

Mr. Athey said the previous board felt that 150 spaces was sufficient for the existing building. Can the Board look at this just by how much parking they need for 1,408 square feet and if they are now providing 166 spaces, 16 over 150, those 16 spaces is substantial. If 150 is the benchmark then he believes the variance request becomes moot. If it is the overall square footage divided by 5.5, then it would be different. Mr. Akin agreed with Mr. Athey's comment.

Mr. Akin asked if the total number of spaces, with the new addition in place, meets the New Castle County Code. Mr. Tucker noted that under the current New Castle County Code 4.5 spaces are required per 1,000 square feet of development. Under the New Castle County Code today, the shopping center, as a total, would require only 125 spaces. In 1996 it is believed that 5.5 spaces per 1,000 square feet as a maximum were required. This would have required 152 spaces. The applicant is in excess of either requirement.

Mayor Klingmeyer asked if this Board used the original City code, what would be the requirement. Mr. Tucker said that three (3) square feet of parking for each square foot of development is the formula in the current Code. *(Discussion about current Code requirements followed.)*

Mr. Bergstrom researched parking demands for retail/commercial parking spaces and learned that four (4) to five (5) spaces per square feet of the useable sales floor (not including restrooms, storage) is reasonable. The City standard does not reflect reductions of non-sales space. Mayor Klingmeyer said when the standard was adopted the Board followed the recommendations of their planners at the time.

Mr. Akin said he did not believe it would be unreasonable for this Board to use the same rationale as was used in 1996. He asked Mr. Bergstrom how frequently this parking lot is at 100% capacity. Mr. Bergstrom's response was that it has never been completely full.

Mr. Akin stated that this Board should be consistent in handling this similar, factual case and grant a variance.

Mr. Tucker said the applicant wants to address the height above the flood plane issue as well. For the record, Mr. Tucker is representing the applicant and the legal entity, South River Plaza LLC, concerning the South River Shopping Center.

Mr. Tucker entered into the record Exhibit #1, the Board of Adjustment decision in October 1996, which they believe is reasonable and sets forth the analysis that has been discussed and requests this Board follow the same rationale and interpretation concerning the parking situation. Also, for consistency, that this Board grant a variance from the Code in the same manner as was done in October 1996. In addition they are seeking to build above the flood plane by approximately .13 feet. The reason for this is to maintain a consistent elevation throughout the shopping center. It is the same variance that was granted for the Happy Harry's drugstore.

At this time Mr. Tucker noted that there was an error in noticing. The variance was noticed for .31 instead of the correct variance of .13. Mr. Athey said the Notice of Public Hearing contains the correct dimension. Mr. Akin said as long as the public is on notice of the true dimension of area variance, this Board can proceed and rule on the request.

Mr. Carmine Casper testified that he is a Delaware-licensed professional civil engineer since 1974. Mr. Casper informed they are proposing a 1,408 square foot addition at the northeast end of the building and at an elevation 9.13 above sea level NAVD 88 datum. Normally it would be required to be built at one (1) foot above the flood plane, making it 10.0; there, they are requesting a variance of .87 to build at 9.13 so there will not be any tripping hazards throughout the building. Some of the stores will be connected to the addition. On the sidewalk the applicant proposes to create a one (1) foot hump to build it one (1) foot above the flood plane. This is similar rationale used for Happy Harry's. Mr. Casper confirmed that he has read the 1996 decision and confirmed that he wrote a

letter to Mr. Tucker detailing the reasons for requesting the 1-1/2 inches above the flood plane instead of one (1) foot above the flood plane. Doing so would create a safer situation. Also, the impact on the 100-year flood plane is minimal and will not create any extraordinary public expense relating to no flood plane insurance. Mr. Tucker referenced a 6/6/96 letter from Mr. Bergstrom that was co-signed by Mr. Wayne Press (Commercial Risk Services, Inc.) confirming that in terms of safety or any potential increase in flood insurance that this type of variance would not impact those issues at Happy Harry's. Mr. Casper has read this letter and concurs with its contents. The letter is part of the 1996 decision marked Exhibit #3. *(Mr. Tucker previously asked Mr. Bergstrom to provide a copy of the 6/6/96 letter.)* The letter from Mr. Casper to Mr. Tucker, dated 12/21/09, is being entered as Exhibit #2.

Mr. Casper's testimony continued. He agrees with Mr. Tucker's testimony concerning standards of New Castle County and what we believe they were in 1996 and what they are today. He also agrees that the proposed parking spaces in the plan before this Board exceed those (New Castle County) standards.

Considering the fact that Mr. Bergstrom submitted a letter in 1996, Mayor Klingmeyer asked for his comments concerning the current situation. Mr. Bergstrom testified that the matter was dealt with with caution in 1996. Generally speaking there is no issue with the City's involvement with the National Flood Insurance Program as long as we do not permit buildings to be built below base plot elevation. The footer freeboard has to have something built into it, and most ordinances refer to minimal expansions of existing buildings and is a matter that is permitted within, but in the City's case every variance to that is supposed to be heard by the Board of Adjustment.

Mr. Athey asked Mr. Casper if the addition being proposed is intended to be connected internally with the current northeasterly store and that the applicant will have 3,500 square feet to lease/rent to one entity, thus the trip hazard. Mr. Casper responded yes and that it is possible the center could be broken up in different ways in the future. Mr. Athey noted that the previous plan as well as the revised plan shows 8.74 and not 9.13. Mr. Casper clarified that Happy Harry's is 9.13. The original shopping center consisted of the units between the new addition and Happy Harry's. When Happy Harry's was built it was found the original structure had sunk about two (2) inches. Happy Harry's was not permitted to be built exactly level with the old center and was built at 9.13, which is what is being proposing now. *(Additional discussion took place.)*

Mr. Athey asked Mr. Casper what the principal hardship would be for the applicant. Mr. Casper noted matching sidewalks (ADA sloping) and safety. He is aware of Chapter 130 that deals with building in flood plane areas.

A drawing showing the 22 foot X 64 foot addition to the shopping center was entered as Applicant Exhibit #4.

Mayor Klingmeyer noted for the record that the official files for the 1996 decision were referenced. Mr. Akin said much of that file pertains to copies of notices and such. Not much substance is contained in that particular file.

Mr. Athey asked how long the one (1) foot of freeboard provisions has been in the Code; does the shopping center predate that requirement? Mr. Bergstrom drafted the ordinance that was adopted by City Council in late 1991 and that the shopping center predates that provision. *(Mr. Tucker read a paragraph on page 3 of the 1996 decision that summarizes the legal standard pertaining to this provision.)*

The floor was closed for testimony. There were no parties present opposing the application.

Mr. Akin believes the Board should handle the parking issue separate from the freeboard issue. The Mayor and Mr. Athey were in agreement.

Mr. Akin will vote in favor of granting the variance, even though this Board is not certain we need to do so. He is satisfied the applicant has met the standards for the variance and if we used the same rationale as was used by the Board in the 1996 decision, the variance should be granted. It is the law of the case and should be granted in these circumstances. He feels the modest size of the addition and the fact that Mr. Tucker testified that 150 spaces are grandfathered by virtue of the prior decision by the Board and Mr. Bergstrom's testimony that rarely, if ever, has he seen this parking area at or near 100% capacity. Retail interests have increased and still the parking lot is not being used at full capacity. This City has admitted to having excessive parking space requirements when compared to other jurisdictions. He also stated this shopping center is unique in the City and the special condition that exists concerning parking spaces is that the issue has been addressed previously by the Board of Adjustment. The modest addition does not fundamentally affect the necessity for a large number of new parking spaces. Literally interpreting the provisions of the zoning code concerning parking would create such an extraordinary burden that the land would lose its usefulness because some of the retail space would need to be removed to provide for the required parking spaces. He suggested that City Council may want to revisit this matter when looking at the Code. Special circumstances have not been created by any negative action by this applicant. The applicant came before the Board of Adjustment 13 years ago to successfully present his case with what should be the proper calculation of parking spaces here. Lastly, granting the parking space variance does not convey to this applicant any special privilege denied to other land or structures in the City because of the unique nature of this parcel and its uses.

Mr. Athey concurs with Mr. Akin's rationale and supports granting the variance. He did note there are three (3) spaces behind Happy Harry's that may not be

known to the public. He spoke to the applicant's request for 166 spaces and suggested showing 163 and eliminate the three (3) spaces aforementioned. *(Discussion followed.)* Mr. Casper noted there is room for a one-way fire lane of 18q

Mr. Athey made a motion to grant a variance stating that 5.5 parking spaces per 1,000 square feet are shown for all existing and proposed floor area as shown on Applicant Exhibit #4. Mr. Akin seconded the motion.

Mayor Klingmeyer agrees with the comments made by Messrs. Akin and Athey in support of granting the request for a parking space variance as well as the decision made by the previous Board of Adjustment in 1996.

Mr. Akin inquired if we are using the 5.5 standard per 1,000 square feet, how many spaces will exist post-construction and how many spaces does the 5.5 standard require be shown? Mr. Tucker calculated 153 spaces. Mr. Akin then withdrew his second to the motion.

After discussion Mr. Athey amended the motion to grant the variance for a parking waiver so that 153 parking spaces are shown on the 27,797 square foot project rise above the existing and proposed proponents. *(Mr. Casper indicated that 153 parking spaces are required using the 5.5 standard.)* Mr. Akin seconded the motion.

A roll call vote was taken.

Mr. Athey voted in favor of granting the parking space waiver.

Mr. Akin voted in favor of granting the parking space waiver.

Mayor Klingmeyer voted in favor of granting the parking space waiver.

The motion was adopted by a unanimous vote.

Mr. Akin then addressed the flood plane issue. The rationale used by the Board in considering the City's Code criteria is still applicable today. He read text from the Board's 1996 decision that states, "The board noted that the shopping center is unique, and that its size and location create conditions and circumstances which are peculiar to this special area. The Board also noted that literal interpretation of the ordinance would deprive the owner of this property of a reasonable opportunity for its use in light of the fact that building one (1) foot above the base flood elevation would probably create a hazard or cause extraordinary expense. It was obvious that the special conditions and circumstances did not result from the actions of the applicant since the shopping center was constructed many years ago by someone else and before the existing Flood Plane Ordinance was enacted to require new construction at one (1) foot or more above the base flood elevation. The Board agreed that the granting of

the variance would not convey on the applicant any special privilege denied by the ordinance to other lands, structures or buildings in the same district in light of the peculiar and unusual nature of this shopping center, the only shopping center (at that time) within the City limits.+

Mr. Akin added there were a number of issues lingering in 1996, one of which was whether granting the variance would have any impact on eligibility for flood plane insurance. Applicant Exhibit #3, Mr. Bergstrom's letter dated 6/1996 to Mr. Press at Commercial Risk Services, Inc. that Mr. Press signed and returned, confirms Mr. Bergstrom's proposition that the construction of Happy Harry's in 1996 would not jeopardize the ability of the residents of the City to receive and benefit from flood rate insurance reductions and the development of Happy Harry's was described as a modest project in the plane. The project before us tonight is much smaller. For all of the reasons stated, Mr. Akin will vote to support granting a variance of .87 feet from the one (1) foot freeboard requirement.

Mr. Athey supported granting the variance. The fact that the majority of the building predates the one (1) foot freeboard requirement is a crucial point.

Mayor Klingmeyer supported granting the variance citing all the rationale noted by Messrs. Akin and Athey.

Mr. Akin added that he is encouraged that the applicant is well aware of the technical construction requirements in this area regarding foundations and construction techniques and is confident this information will be provided to the Code Official during the construction.

Mr. Athey made a motion to grant the 0.87 foot variance from the one (1) foot freeboard above base flood level elevation as stated in the City Code. Mr. Akin seconded the motion. The motion was adopted by unanimous vote.

The hearing was adjourned at 8 p.m.

Respectfully submitted,

Debbie Turner
Stenographer

Applicant Exhibits

Applicant Exhibit #1 . 1996 Board of Adjustment Decision

Applicant Exhibit #2 . Letter (12/21/09) from Carmine Casper to Shawn Tucker

Applicant Exhibit #3 . Letter (6/6/96) from Jeff Bergstrom with Wayne Press

Applicant Exhibit #4 . Drawing illustrating the 22 foot X 64 foot addition